

05-72 DEC 2 2005

No. 05-

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IN THE

Supreme Court of the United States


MARVIN SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

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QUESTIONS PRESENTED

- I. Whether the government waives harmless error review of preserved trial errors when it does not argue harmless error on appeal?
- II. Whether this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)?

PARTIES TO THE PROCEEDINGS

Petitioner Marvin Smith was a defendant and an appellant below.

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**Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Smith ("Smith") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Sixth Circuit affirming the District Court's judgment of conviction and sentence is published at 419 F.3d 521 (6th Cir. 2005), and is reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 2005. App. 1a. A timely petition for rehearing was denied on September 6, 2005. App. 18a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(a) provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”

The Sixth Amendment to the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....”

INTRODUCTION

This case presents an important and recurring question in the application of Fed.R.Crim.P. 52(a), the “harmless error” rule: whether a federal appellate court may *sua sponte* find that a preserved trial error was harmless where the government waives harmless error review by failing to argue it on appeal and, if so, what factors must guide the appellate court’s exercise of discretion?

This case also presents the ideal vehicle for this Court to overrule its decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), because the district court sentenced Smith to an enhanced mandatory minimum of twenty years based on a prior conviction that was neither alleged in the indictment nor considered by the jury. The decision in *Almendarez-Torres* is